Supreme Court, U.S.
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No. 94-567

In The

Supreme Court of the United States

October Term, 1994

EDWARD DUFFY,

Petitioner,

v.

THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

Respondent, THE DISTRICT BOARD OF TRUSTEES of MIAMI-DADE COMMUNITY COLLEGE, respectfully restates the questions presented as follows:

1. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN ISSUE WHICH THE DISTRICT COURT HELD WAS NOT RAISED TIMELY, AND WHICH WAS THEREFORE NOT CONSIDERED BY THE DISTRICT COURT, PARTICULARLY WHERE THE DISTRICT COURT'S SUMMARY FINAL JUDGMENT BASED UPON OTHER GROUNDS WAS AFFIRMED BY THE ELEVENTH CIRCUIT COURT WITHOUT OPINION.

2. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

3. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff: Edward Duffy

Defendant: The District Board of Trustees of Miami-Dade Community College

SUPREME COURT RULE 29-1
STATEMENT OF INTERESTED PARTIES

Honorable Edward Davis
United States District Judge

Edward Duffy,
Plaintiff/Appellant

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The District Board of Trustees of
Miami-Dade Community College
Defendant/Appellee

American Insurance Group (Appellee Miami-Dade's Insurance Carrier)

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THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE, prays that this Court deny the Petition for Writ of Certiorari filed by the Petitioner, EDWARD DUFFY.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts presented by the Petitioner is misleading and largely irrelevant, and therefore the Respondent will provide the following statement of the case and facts.

The Plaintiff, Edward Duffy, a black male associate professor at Miami-Dade Community College filed this

Title VII action against the District Board of Trustees of Miami-Dade Community College (hereinafter Miami-Dade). The operative pleading is the three page amended complaint filed by Duffy in January of 1991. (R1-19). Duffy alleged in his amended complaint that after applying for the position of Associate Dean of Student Services for the Wolfson Campus of the College in 1989 he was not selected for the position because he is black. He also claimed that he was the best qualified person for the position.

After extensive discovery, Miami-Dade moved for summary judgment based upon the following undisputed facts:

In 1989, Miami-Dade sought applications for the position of associate dean of student services at the Wolfson Campus. Pursuant to Miami-Dade's established procedures, a screening committee was selected to review the 50 or so applicants that had been submitted for the position, and to interview the applicants. The members of the screening committee were selected pursuant to established procedures of the College.

The objective in selecting members of the Screening Committee was to obtain a group that was both race and gender diverse. The Screening Committee was comprised of a cross section of faculty, administrative and clerical positions on campus, including persons who would be working within the department in which the position was located, i.e. Student Services. (R1-59-8; 11-14). The vacancy announcement for the position was posted internally at the college, as well as in the *Miami Herald*, the *Miami Times* and *El Diario*. As a result of the advertising

of the vacancy, approximately fifty individuals applied for the position of Associate Dean of Academic Support. After the applications had been submitted, the Screening Committee met to discuss the procedures that would be utilized to narrow the field of applicants to a number that would be interviewed for the position. (R1-64-10-12; R1-60-13-15). After each applicant was "paper screened" to see if the applicant met the general qualifications set forth in the job description, the Screening Committee met again to determine what individuals would be interviewed for the position. In paper screening the applicants, the Screening Committee decided which applicants did not meet the specifications of the job description, which applicants fully met the specifications of the job description, and which applicants deserved further consideration based on experience and credentials. (R1-63-10).

The Screening Committee met again to determine what individuals would be interviewed, based on the above criteria. Of the approximately fifty initial applicants, twelve persons were selected to be interviewed for the position. These include the following individuals who are listed in alphabetical order: (1) Armando Corominas-white male, hispanic, (2) Benjamin Cowins-black male, (3) Edward Duffy-black male, (4) Paula Epstein-white female, (5) Peggy Demon-black female, (6) Armando Ferrer-white male, hispanic, (7) Scott Ingold-white male, (8) John Kemppainen-white male, (9) Dorothy O'Connor-white female, (10) Diane Otis-white female, (11) Robert Pepin-white male, (12) Willie Warren-black male.

Having narrowed the field to twelve candidates, the Screening Committee was prepared to interview the candidates. A list of general questions was prepared, although as the interviews took place, individualized and tailored questions were asked of each candidate by the Screening Committee. (R1-63-12).

Petitioner Edward Duffy was selected as one of the twelve semi-finalists to be interviewed by the Screening Committee. After the interviews were completed, each member of the Screening Committee was directed by the Chairman of the committee, Rene Garcia, to *vote for the five individuals they felt to be best qualified for the position.* (R1-60-30) (R1-63-15-17).

After the secret ballots were cast, the totals were added up by the Chairman, Rene Garcia. Plaintiff Edward Duffy received two votes (from Screening Committee members Cristina De Armas and Lucinda Woodson). At this stage, Edward Duffy was eliminated from consideration since he had received only two votes. The top five applicants were Scott Ingold (6 votes), *Armando Ferrer* (5 votes), Robert Pepin (4 votes), Benjamin Cowins (4 votes), and Willie Warren (3 votes) (R1-63-54, Plaintiff's Ex. #1). Two of the five finalists – Benjamin Cowins and Willie Warren – are black males.

The names of the five finalists for the position of Associate Dean for Academic Support were then forwarded by the Chairman of the Screening Committee to the Dean of Student Services, Dr. Castell Bryant, a black female. Pursuant to the procedures established at the college, Dr. Bryant interviewed the five finalists that had

been selected by the Screening Committee. After completing her interviews, Dr. Bryant recommended to Dr. Eduardo Padron the individual that she felt to be best qualified for the position – Armando Ferrer. (R1-56-31-34).

It would be difficult to imagine a selection process that was more fair than the process established by Miami-Dade to fill the position of Associate Dean of Academic Support. The very nature of the screening process makes it highly unlikely – if not completely impossible – that any type of discriminatory animus was behind Duffy's failure to make the final cut to 5 candidates. The screening committee could be described as both horizontally and vertically integrated. The committee was racially integrated, as well as gender integrated; it was comprised of individuals of varying job descriptions, from the clerical staff on up through the faculty and administration.

During the course of discovery, screening committee members were deposed and questioned about the basis for their decisions. Each testified that he or she applied the job specifications and qualifications to the 12 semi-finalists during their interviews and thereafter voted for the 5 best qualified candidates. In particular, Lucinda Woodson (a black female), stated that Ferrer's professional background as registrar, assistant dean of students and his work on South Campus prepared him for the

position. (R1-54-26). Robert Stevens specifically compared Ferrer and Duffy and indicated that Ferrer's experience relative to Duffy's was broader and that his perception of leadership ability was a very important factor. (R1-65-32). Carmen Borroso (a female latin clerical worker) stated that she voted for Ferrer to become a semi-finalist because he was head of the registration and administration department. (R1-65-13). Rene Garcia, the chair of the committee, stated that the committee was looking for "someone who would provide some leadership." (R1-60-29). Based upon this and similar testimony from other screening committee members, the court made a finding that it was undisputed that articulate, legitimate non-discriminatory reasons were established for the selection of Ferrer.

In this context, it must also be remembered that the 5 finalists were then personally interviewed by Dr. Castell Bryant, a black female, who was the Dean of the Wolfson Campus. In addition, it must be noted that *the screening committee had selected two black males to be in the group of 5 semi-finalists.* Neither of those black males filed suit when they were not selected to fill the position.

The Plaintiff Offered No Evidence That Miami-Dade's Reasons Were Pretextual

In response to the motion for summary judgment, which set forth extensive deposition testimony from the screening committee members, Dr. Bryant, and from Mr. Duffy himself, Duffy filed only his own self-serving affidavit and the hearsay-ridden affidavit of Venise Langlois, an ex-employee at the Wolfson Campus (who was not a member of the Screening Committee). Where an affidavit

contains hearsay, it cannot be considered on motion for summary judgment. ***See, Martin v. John W. Stone Oil Distr. Inc.,*** 819 F.2d 547, 549 (5th Cir. 1987); ***Ocean Bio-Chem v. Turner Network Tel.,*** 741 F.Supp. 1546, 1559 (S.D. Fla. 1990); ***Martin v. Ryder Distribution Resources, Inc.,*** 811 F. Supp. 658, 664 n.14 (S.D. Fla. 1992).

The District Court appropriately determined that Duffy's and Langlois' naked assertions of preferential treatment extended to latins to the detriment of blacks at Miami-Dade was "totally unsubstantiated." The court noted that both affidavits were "devoid of any facts to support a pattern and practice of preferential treatment." (R1-93-7).

REASONS FOR DENYING THE WRIT

The "decision" under review is an unpublished per curiam affirmance issued by the Eleventh Circuit Court of Appeal. As such, by definition, it can neither create conflict with any other extant decisions, nor can it be said to *address* an important issue of federal law. This Court's certiorari jurisdiction should not be exercised to "second guess" a summary judgment which has been affirmed without opinion by a Circuit Court of Appeal.

ARGUMENT

I.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN ISSUE WHICH THE DISTRICT COURT HELD WAS NOT RAISED TIMELY, AND WHICH WAS THEREFORE NOT CONSIDERED BY THE DISTRICT COURT, PARTICULARLY WHERE THE DISTRICT COURT'S SUMMARY FINAL JUDGMENT BASED UPON OTHER GROUNDS WAS AFFIRMED BY THE ELEVENTH CIRCUIT COURT WITHOUT OPINION.

The Petitioner initially asserts that the 11th Circuit *implicitly* has decided the fundamental question of whether a new academic institution with no history of discrimination may commence and maintain an affirmative action plan. This argument is not only frivolous, it borders on bad faith.

The Appendix to the Petitioner's Writ of Certiorari before this Court confirms that the District Court order which granted Respondent's motion for summary judgment in this Title VII action *Specifically determined* that the "issue" of the affirmative action plan *had not been raised* by the pleadings, and the District Court would not allow the new, unplead argument, to be raised on the eve of trial. *See,* Footnote 2 to the District Court's Order granting summary judgment (Petitioner's Writ of Certiorari at Page a-6). There the District Court noted:

> The court construes Duffy's assertions related to the constitutionality of the affirmative action plan as *an attempt to amend the complaint on the eve of trial.* To allow Duffy to amend the complaint at this procedural juncture *would prejudice*

> *Miami-Dade by unreasonably protracting the litigation.* The court declines to do so. ***Nolan v. Douglas Co.,*** 903 F.2d 1546, 1551 (11th Cir. 1990).

(A-6) (Emphasis added).

Thus, the District court *explicitly* declined to address the merit (or lack of merit) of the Petitioner's affirmative action argument. It follows, a fortiori, that the Eleventh Circuit's per curiam affirmance of the District Court's summary judgment did not address the merits of that argument, because the argument was never properly before the District Court or the Eleventh Circuit. As such, it is improper to raise the issue here. ***See, Hennessey v. Dunlap,*** 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976) (claim not pleaded in complaint and not considered by the District Court or court of appeals was not before the Supreme Court on certiorari).[1]

Thus, although the Petitioner presents an interesting discussion of this Court's precedent concerning affirmative action plans (Petition at Pages 13-18) that discussion is completely irrelevant, and we will not waste this Court's time with a substantive response to that argument.

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[1] By separate motion the Respondents are seeking attorneys fees and double costs as a sanction against Petitioners and their counsel for the filing of this frivolous petition.

II.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

The principal purpose for which this court entertains certiorari jurisdiction is to resolve conflicts amongst Circuit Courts of Appeal and state supreme courts concerning the meaning of provisions of federal law. ***Braxton v. U.S.***, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991). This Court's certiorari jurisdiction is discretionary, and ordinarily will not be exercised in the absence of a lower court's opinion which *explicitly* passes upon a question of great importance related either to the Constitution or to a federal law, or where there is conflict of authority between Circuit Courts of Appeal that is "real and embarrassing." ***See, Rice v. Sioux City Memorial Park Cemetery,*** 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed.2d 897 (1955).

The Petitioner appears to be arguing in his second point that the Eleventh Circuit's per curiam affirmance of the District Court's summary judgment in this Title VII action creates conflict with the numerous decisions (Petitioner's Brief at Pages 19-21) that echo the legalism that cases involving questions of motivation and intent of a particular party are *typically* poor candidates for disposition via summary judgment.

Aside from the unassailable fact that a per curiam affirmance cannot present "real and embarrassing" conflict with any other decision, we must note that the very decisions relied upon by the Petitioner do not set forth a bright line rule against the use of Rule 56 in a Title VII

action. ***See, Thornbrough v. Columbus and Greenville Railroad Co.,*** 760 F.2d 633, 640 (5th Cir. 1985) ("*often* motivation and intent can only be proved through circumstantial evidence"); ***Miller v. FDIC,*** 906 F.2d 972, 974 (4th Cir. 1990) (noting general rule that summary judgment is *seldom* appropriate in cases wherein particular states of mind are decisive elements of a claim or defense); ***Wilson v. Seiter,*** 893 F.2d 861, 866 (6th Cir. 1990) ("we are aware that state of mind is *typically* not a proper issue for resolution on a summary judgment."), vacated on other grounds, ___ U.S. ___, 111 S.Ct. 2321 (1991); ***National Union Fire Ins. Co. v. Turtur,*** 892 F.2d 199, 205 (2d Cir. 1989) ("questions of intent, we note, are *usually* inappropriate for disposition on summary judgment.").

While it is true that courts have urged caution in granting summary judgment in employment discrimination cases, the summary judgment procedure is not and never has been prohibited in this field. ***See, e.g., Mesnick v. General Electric Co.,*** 950 F.2d 816 (1st Cir. 1991); ***Summers v. State Farm Mutual Automobile Ins. Co.,*** 864 F.2d 700 (10th Cir. 1988); ***Ross v. Communication Satellite Corporation,*** 759 F.2d 355 (4th Cir. 1985), abrogated on other grounds, ***Price Waterhouse v. Hopkins,*** 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); ***Steckl v. Motorola, Inc.,*** 703 F.2d 392 (9th Cir. 1983).

The court in ***Summers v. State Farm*** noted that "recent cases indicate that even in discrimination cases, summary judgment is not an impossibility, and that obvious cases should be weeded out before trial." 864 F.2d at 709. In ***Ross v. Communication Satellite Corp.,*** 759 F.2d 355, 365 (4th Cir. 1985), the court pointed out that summary judgment does have a role in Title VII

litigation and the fact that motive is often (if not always) an issue in employment discrimination cases does not mean that summary judgment is *never* (emphasis theirs) an appropriate vehicle for resolution of a Title VII case. The court made it clear that *unsupported allegations concerning a defendant's motive did not grant talismanic immunity from Rule 56. Id.* at 365. Otherwise, there would never be a summary judgment granted in a Title VII action.

In fact, it has been noted that one of the very purposes of the burden shifting analysis first instituted by this Court in ***McDonell Douglas Corp. v. Green,*** 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), is to "identify meritless suits and dispense with them short of trial." ***See, Foster v. Arcata Assoc., Inc.,*** 772 F.2d 1453, 1459 (9th Cir. 1985).

In short, the Petitioner's second point is as meritless and frivolous as his first point. The Respondent urges this Court to grant its separate motion for attorney's fees.

III.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

Petitioner relies upon ***McLean Trucking Co. v. NLRB,*** 719 F.2d 1226 (4th Cir. 1983), which addresses the issue of "shifting justifications" in the context of a Title VII action.

However, Petitioner cites a portion of that opinion out of context, 719 F.2d at 1231, (Petitioner's Brief at Page

25), and ignores a more applicable qualifying paragraph in the opinion.

After discussing the "legalism" that shifting justifications can "*in certain circumstances*" constitute "affirmative and persuasive reasoning" for concluding that a particular justification never truly figured into the employer's actual decision, the court went on to reject that legalism in the context of the facts before it:

> Legal propositions in their abstract guise, however, should not be cited and applied indiscriminately, because, not infrequently, they fail to take into account facts rendering the legalisms inapposite. The Board committed such an indiscretion when it branded McClean's resort to Daniels' overall work record a "shifting of defenses."

Id.

Although the Eleventh Circuit's unpublished per curiam affirmance does not create conflict with any other reported decision, nor does it by definition articulate an important federal question which must be answered by this Court, we hasten to point out that the record in this case amply supports both the justifications that were relied upon *in this lawsuit*, and amply supports a reasonable explanation for why the initial EEOC response was somewhat different. First, there is no dispute about the fact that the individual who responded to the EEOC complaint on behalf of Miami-Dade had not bothered to interview a single member of the search committee. Thus, when the reasons were articulated by the members of the search committee, there was no "shifting." Their reasons were being presented for the first time.

Second, although the phrase "failed miserably" when used in the EEOC response to explain how the Petitioner had done during his interviews may have been an overstatement, it is undisputed, as the District Court noted in its order granting motion for summary judgment, that Mr. Duffy did in fact fail to make the cut from the 12 semi-finalists to the 5 finalists. And since the only basis which was utilized to pare the list down from 12 to 5 was the interview process, it follows that Mr. Duffy did in fact "fail" during the interview process. The description by the committee members of his interviews as "fine" and "OK," are not exactly indicative that Mr. Duffy was the appropriate candidate for the position.

CONCLUSION

This Court should decline to exercise jurisdiction over this matter. The Eleventh Circuit's unpublished per curiam affirmance of the District Court's order granting summary judgment is simply not a proper subject for this Court's certiorari jurisdiction.

The unpublished per curiam affirmance cannot, by definition, decide an issue of great importance to the Constitution or federal law, nor can it create any type of "real and embarrassing" conflict with any decisions of other circuit courts. Finally this Court should decline to

exercise jurisdiction because summary judgment was appropriately granted by the District Court.

Respectfully submitted,

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